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'98; he was shortly afterwards elected to Congress from the Williamsburg district, where he remained one year, declining reelection. In 1825 he became a Senator of the United States, and afterwards a member of the famous Virginia Convention of 1829-30. He afterwards became Governor of Virginia. He resigned his positions as Senator and Governor. Throughout all this period he was a lawyer of the highest distinction, practising in the Supreme Court of the United States as well as in the courts of his own State, and in the enjoyment of a great national reputation. But, above all this, he was a man true to himself and his convictions, esteeming everything else as a bauble in comparison.

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AN ANALYSIS OF CHAPTER 103 OF THE VIRGINIA CODE,  
CREATING AND REGULATING THE SEPARATE  
ESTATE OF MARRIED WOMEN.

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The subjoined analysis of the Married Woman's Statute in Virginia was prepared primarily for the use of students in class-room work. The idea in mind was to set each provision apart to itself, with appropriate head-lines, so as to enable the student to more readily get hold of and retain in his mind the main features of the statute.

In the absence of judicial construction, there has necessarily been much guess work, howsoever dogmatically the propositions may have been announced.

It is hoped that the analysis may be of assistance to the practitioners of the State, few of whom, it is believed, have found the time and inclination to thoroughly digest the chapter in its entirety.

For convenience of reference, the full text of the chapter is published as an appendix to the analysis.

I. Property affected by this chapter—

1. All property *acquired* by any married woman *since May 1, 1888*, regardless of the date of the marriage.<sup>1</sup>

Though the right may have accrued and the marriage have taken place antecedently, yet if in action, unreduced at the date of the mar-

<sup>1</sup> Code, sec. 2284.

riage, the property is regarded as having been acquired under the Code, and the marital rights of the husband are defeated.<sup>1</sup>

2. All property of a wife *married since May 1, 1888*, regardless of the date of its acquisition.<sup>2</sup>

Both of these propositions are subject to the qualification that if the terms of the settlement would have created an equitable separate estate in the wife, prior to the enactment of this chapter, the same result still obtains; the equitable separate estate being preserved in express terms.<sup>3</sup>

**II. Character of property made separate estate**—The separate estate<sup>4</sup> comprises every conceivable species of property—including, besides ordinary real and personal property, damages to the wife's person or estate, and compensation for her property taken for public use,<sup>5</sup> and the products and earnings of any business in which she may be engaged, or of work or services performed for a person other than her husband or children.<sup>6</sup>

**III. Wife's powers of control, enjoyment and disposition**—The wife has the same powers over her separate estate, with respect to the control, enjoyment and disposition thereof, as if she were unmarried—in other words, the same powers as the husband has over his property, and they are exercised in the same manner, whether by deed, will or otherwise; but as the husband cannot by his sole act deprive her of dower in his real estate of inheritance, should she survive him, so she cannot by her sole act deprive him of curtesy consummate in her real estate, where he is the survivor and the common law requisites for curtesy exist.<sup>7</sup> Indeed, she has more power over her personal estate than the husband has over his, since he cannot by will deprive her of her distributive share,<sup>8</sup> whereas, she is clearly given the power to deprive him by will of any distributive share whatsoever.<sup>9</sup>

It follows that no consent or participation on the part of the husband is essential for the disposition by the wife of her separate estate,

<sup>1</sup> *Alexander v. Alexander*, 85 Va. 353; *Keagy v. Trout*, *Id.* 390. These cases arose under the Smith Act, but seem equally applicable here.

<sup>2</sup> Code, sec. 2284.

<sup>3</sup> Code, sec. 2294; *Dezendorf v. Humphreys*, 95 Va. 473; *post*, XVII.

<sup>4</sup> The expression "separate estate" is used in this paper to denote property owned by the wife, under this chapter. The expression seems to have been so used by the revisors throughout the chapter.

<sup>5</sup> Code, sec. 2284.

<sup>6</sup> Code, sec. 2287.

<sup>7</sup> Code, sec. 2286.

<sup>8</sup> Code, sec. 2559.

<sup>9</sup> Code, sec. 2286.

real or personal; save that in case of a devise of her real estate, or a conveyance thereof by her sole deed, the devisee or grantee would take subject to the husband's curtesy consummate, should the husband survive her—just as the husband's devise or sole conveyance carries title to his real estate, subject to the wife's right of dower if she survive him.

#### IV. Husband's interest in wife's separate property—

1. *During coverture.* He has no interest in or control over it, whether it be real, personal or mixed, in possession, in action or in reversion, nor is it in any manner subject to his debts.<sup>1</sup>

##### 2. *After coverture ended, by death of the wife—*

(a) *As to real estate.* If the common law requisites exist, the surviving husband is entitled to curtesy, and of this, as already shown, she cannot by her sole act deprive him.<sup>2</sup>

(b) *As to personal estate.* The husband has no marital rights therein, nor have his creditors, unless she die intestate; in which case he takes, as sole distributee, the whole of that as to which she is intestate, after payment of her debts, charges of administration, etc.<sup>3</sup>

V. *Wife's rights as to her person, time, etc.*—She may (apparently against her husband's wishes) engage in trade or business, or may work and labor for another, as if unmarried; and the products of such trade, business, work and labor belong to her.<sup>4</sup> But it is held that unless actually so engaged in trade, business, work or labor for another, her time and services belong to her husband, so that in an action for personal injuries, she cannot in such case, recover damages for loss of her time.<sup>5</sup>

VI. *Husband's interest in wife's person, time, etc.*—It is generally held that notwithstanding the wife is, to a certain extent, emancipated by modern legislation, the husband is still the head of the house, and entitled to the services of his wife in the household, with a legal right to the *consortium*; and hence when she is personally injured, he may recover damages, not indeed for her physical suffering, nor for loss of time to her separate business (since, as we have seen,

<sup>1</sup> "Such separate estate . . . shall not be subject to the use, control or disposal of her husband, or to his debts or liabilities, whether contracted or incurred before or after marriage." Code, sec. 2285.

<sup>2</sup> Code, sec. 2286.

<sup>3</sup> Code' secs. 2293, 2557 (sub-sec. 2).

<sup>4</sup> Code, sec. 2287.

<sup>5</sup> *Richmond, &c. R. Co. v. Bowles*, 92 Va. 738 (2 Va. Law Reg. 9, and note by Judge Burks); *Atlantic, &c. R. Co. v. Ironmonger*, 95 Va. 625.

such damages belong to her, constituting a part of her separate estate),<sup>1</sup> but for the expense of her cure, loss of her household services, and of her society and companionship.<sup>2</sup> So that in such case there may be two suits—one by the wife to recover damages for the physical suffering, and, in a proper case, for loss of time, and the other by the husband for damages suffered by him in his character as husband.

VII. **Wife's rights in husband's person**—The doctrine of the common law that the wife has no legal interest in the person or the society of her husband, and hence cannot sue for an injury causing to her a loss of his society and protection,<sup>3</sup> was the logical result of the unity of husband and wife as viewed by the common law. She could not, for example, recover damages for the alienation of his affections, because she could not sue alone, and it would have been illogical and inconsistent to allow him to unite with her to recover damages for a wrong in which he was a participant—especially as the damages recovered would belong to him and not to her. Or, again, where the injury to the wife's rights did not arise from the husband's wrong-doing, to have allowed him to recover in his own right for the injury to *him* personally, and the husband and wife to recover, in the right of the wife, for the injury to *her*, through the injury to the husband, would have resulted in giving the husband double damages for the same wrong—since the recovery in either case would have belonged to him. So that the real reason of denying her a right of action for injuries to her husband seems to have lain in this difficulty in the matter of the remedy.

Since the adoption of statutory provisions removing the disabilities of coverture, and permitting married women to assert their rights without uniting their husbands, and making damages recovered for personal injuries to them their separate estate, the tendency is to reverse the ancient rule, and to allow married women to recover for injuries done to them in the married relation, as freely as was allowed at common law to their husbands.<sup>4</sup>

<sup>1</sup> *Ante*, II.

<sup>2</sup> *Richmond, &c. R. Co. v. Bowles*, 92 Va. 633, 644; note to *Harmon v. Old Colony R. Co.*, 2 Va. Law Reg. 12; *St. Louis, &c. R. Co. v. Henson*, 58 Fed. 531 (7 C. C. A. 349); *Chicago, &c. R. Co. v. Honey*, 63 Fed. 39 (12 C. C. A. 190); *Kelly v. New York, &c. R. Co.*, 168 Mass. 308 (60 Am. St. Rep. 397); *Holleman v. Harward*, 119 N. C. 150 (56 Am. St. Rep. 672); the latter an action for selling opium to wife against husband's protest.

<sup>3</sup> 4 *Minor's Institutes* (3d ed.), 18.

<sup>4</sup> *Westlake v. Westlake*, 34 Ohio St. 691 (32 Am. Rep. 397); *Foot v. Card*, 58 Conn. 4 (18 Am. St. Rep. 258); *Waldron v. Waldron*, 45 Fed. 315; *Brown v. Brown* (N. C.), 27 S. E. 998; *Clow v. Chapman* (Mo.), 28 S. W. 328 (46 Am. St. Rep. 468, and cases collected in note); 3 Va. Law Reg. 906; 4 Va. Law Reg. 60; *Smith v. Smith*, 98 Tenn. 101 (60 Am. St. Rep. 838).

### VIII. Wife's contractual powers—

1. *Executed contracts.* We have already seen<sup>1</sup> that the wife may convey, devise, transfer, incumber or otherwise dispose of her separate estate, as if unmarried, with the same freedom and in the same manner that the husband may dispose of his.

2. *Executory contracts—*

(a) *Contracts made in direct connection with her trade, business, labor or services.* It is perfectly clear that if the wife is engaged or is engaging in business, trade, work or labor, she may make any contract in connection therewith that an unmarried woman might make,<sup>2</sup> save that she cannot enter into a partnership with her husband.<sup>3</sup>

Hence, if engaged or engaging in trade or business, she may borrow and lend money, buy and sell goods, rent a place of business, employ clerks and other assistants, and make any other contract she sees fit in connection with such trade or business. And so, though not engaged in trade or business, she may contract with third persons to perform for them labor or services of whatsoever character, with all the ensuing rights and liabilities of an unmarried woman.<sup>4</sup> And where not expressly agreed to the contrary, all such contracts for work and labor are presumed to be on her separate account.<sup>5</sup>

(b) *Contracts in connection with, or concerning, her separate estate, or expressly upon the faith and credit thereof.* Whatever broader powers she may possess, it is clear enough that if she has separate estate she may make any contract directly concerning the same (as, for example, to sell or lease), or expressly upon the faith and credit thereof (as, for example, by expressing in the contract that it is made upon the faith and credit of such estate).<sup>6</sup>

(c) *Contracts of warranty, in a conveyance of common law lands, or of her contingent dower interest.* By the provisions of section 2295, every contract which the wife has power to make, is deemed to be made with reference to her separate estate as a source of credit—*except* “that if the contract be a covenant or warranty in such a writing as

<sup>1</sup> *Ante*, III.

<sup>2</sup> “She may make contracts as if sole, in respect to such trade, business, labor (and) services . . . and upon such contracts, she may sue and be sued . . . as if unmarried.” Code, sec. 2288.

<sup>3</sup> Code, sec. 2287: *post*, VIII, 2 (d).

<sup>4</sup> Code, sec. 2288.

<sup>5</sup> Code, sec. 2287.

<sup>6</sup> “She may make contracts as if sole, in respect to . . . such separate estate, or upon the faith and credit thereof.”—Code, sec. 2288. The phrase, “in respect to,” as here used, seems to mean “in connection with,” or “concerning,” since it is used in contrast with the phrase “on the faith and credit thereof.”

mentioned in section 2502, it shall be subject to the provisions of the said section."

Section 2502, here referred to, relates to conveyances of the common law lands of the wife, or of her contingent right of dower in her husband's lands, in either of which he must unite. And it is therein provided, in substance, that no covenant or warranty in such deed conveying *her own common law lands* shall be binding upon her, unless made in reference to her separate estate; and where the conveyance is of her *contingent right of dower*, no covenant or warranty therein shall bind her, unless made with *express*<sup>1</sup> reference to her separate estate as a source of credit.

The effect of this provision would seem to be that the covenant or warranty in such conveyances, binds the wife only as to her separate estate—that is, the judgment thereon would be a limited one under section 2289.

(d) *Contracts of partnership with her husband.*—The wife is expressly prohibited from carrying on business as a partner with her husband.<sup>2</sup> If she enters into partnership with him, notwithstanding the prohibition of the statute, it is probable that all partnership contracts and transactions would be invalid as to her—in other words, she would be regarded as still under the disabilities of the common law as to such transactions. Aside from questions of her liability, difficult questions will arise as to her rights in the capital, profits and accumulations of the business. The solution of these must await authoritative construction.

(e) *General contracts, not in connection with her trade, business, etc., or her separate estate, nor made expressly upon the faith and credit thereof.* The question of the wife's power to make general contracts, that is, those having no connection with her trade or business, work or labor, or her separate estate, nor made expressly upon the faith and credit thereof, presents more difficulty, and has given rise to more diversity of opinion than any other that is likely to arise under this chapter.

It is generally conceded that if she possesses separate estate, of appreciable value, any contractual liability that she may incur will, as a matter of law, be presumed to have been incurred on the faith and credit of her separate estate. Indeed, the statute in express terms declares that every contract which she has power to make shall be

<sup>1</sup> "Express," is omitted in the amendment, probably through inadvertence. Acts 1889-90, p. 193.

<sup>2</sup> Code, sec. 2287.

deemed to be made with reference to her separate estate as a source of credit.<sup>1</sup>

But the difficult question is, need she possess any separate estate whatever as a prerequisite to the power of binding herself by a general contract, *i. e.*, a contract in no wise concerning her separate estate or business, nor expressly on the credit of such estate?

This question is discussed at some length in a paper by the present writer, in 3 Virginia Law Register, 635, in which the conclusion is reached that possession of separate estate is not an essential qualification for the exercise of general contractual powers on the part of the wife, but that every married woman has unlimited powers of contract under this chapter, save as to her common law lands, her equitable separate estate, and contracts of partnership with her husband. By "unlimited powers of contract" is meant the power to bind herself personally on any contract (not within the exceptions just mentioned) that a *feme sole* might make, upon which contract a limited judgment may be recovered against her, under the provisions of section 2289—a judgment binding her person and any separate estate she then has or may thereafter acquire, but nothing more.

The reasoning by which this conclusion is reached is briefly this: At common law the wife could make no contract; under the rules governing the equitable separate estate her general engagements do not bind her person, but her equitable separate only, to the extent of her powers over it; she can not anticipate the acquisition of such an estate, and hence her engagements bind only what she has at the time of the engagement; hence, ownership of equitable separate estate is an essential prerequisite to her power to enter into such contractual engagements, and her powers are measured by and limited to the value of the equitable separate estate owned at the time.<sup>2</sup> And, under the peculiar language of the Smith Act, the same rule obtains.<sup>3</sup> In neither case can a personal judgment be recovered against the wife, and in both the *value of the estate owned is the measure of her contractual powers*.

But this chapter makes radical departures from these principles. A personal judgment may be rendered against the wife, and this judg-

<sup>1</sup> Code, sec. 2285.

<sup>2</sup> *Filler v. Tyler*, 91 Va. 458 (1 Va. Law Reg. 345, and note); *Burks' Prop. Rights Married Wom.* 42.

<sup>3</sup> *Duval v. Chelf*, 92 Va. 489 (1 Va. Law Reg. 895, and note).



ment binds any separate estate she then has or may subsequently acquire.<sup>1</sup>

It therefore follows that the reasons for the property qualification existing in the case of the equitable separate estate and under the Smith Act no longer obtain under this chapter. In the former case, ownership of estate was essential, because she could not bind her person, and, hence, if she bound anything, it must have been her estate. Without estate, she bound nothing, and her attempted contracts were void. But under this chapter she is expressly empowered to bind her *person*. In the former cases she could not bind future estate, because she could not bind what she did not possess. Under this chapter, *express power is given her to bind future estate*. It is provided, in the plainest terms, that a judgment against her is personal, and shall bind not only present but future separate estate. In short, in the former cases the policy of *non-anticipation* was rigidly insisted upon—in the latter, this policy is reversed and powers of *anticipation, without limit*, are conferred in terms.

As her contractual powers under this chapter, then, are not measured by the value of separate estate owned at the time, as in the case of the equitable separate estate and under the Smith Act, there can be no dissent from the conclusion that if she possesses \$1,000 worth of separate estate, she may validly enter into a contract to the extent of \$100,000, upon which contract a personal judgment would be entered, to the satisfaction of which judgment any separate estate acquired in the future might be subjected. In other words, as to \$99,000 she contracts with reference to separate estate *which she does not possess*. If she may thus contract as to the \$99,000 on the faith and credit of property which she does not possess, why may she not contract to the extent of \$1,000, or any other amount, *in the first instance*, though at the time possessed of no separate estate? There is nowhere in the statute any intimation of the necessity of the ownership of separate estate to qualify the wife thus to make contracts, unless it be the provision that she may contract on the faith and credit of her separate estate.<sup>2</sup>

In a recent paper by Mr. Burks,<sup>3</sup> in which this question is dis-

<sup>1</sup> "In any case in which a married woman may sue or be sued under the provisions of the preceding section, a personal judgment or decree may be rendered for or against her; and when against her, the same may be enforced against her, and any separate estate she has, or may subsequently acquire (but only against such estate), in the same manner as if she were unmarried."—Code, sec. 2289.

<sup>2</sup> Code, secs. 2288, 2295.

<sup>3</sup> 3 Va. Law Reg. 797.

cussed, the argument is made that she cannot, in the nature of things, contract on the faith and credit of property which she does not possess. But the statute, in the plainest terms, as shown, gives her *two* sources of credit, viz., her person and her separate estate; and in equally plain terms, as illustrated in the foregoing example, authorizes her to contract on the credit of future estate, by providing that the judgment against her shall bind such future estate. Her husband and her unmarried adult sisters may contract, without the ownership of present estate, on the credit of their persons, and their future estate, and why not the wife? As there is no inherent difficulty in the way, and no provision in the statute to place difficulty in the way, and no policy to be subserved in requiring the property qualification, the conclusion seems to be inevitable that no such property qualification is essential. This conclusion is strengthened by considering the inconsistency of allowing one wife, with a small separate estate, to make contracts to an unlimited extent, and yet prohibiting her who is without such estate to contract even to the most insignificant extent.

As the policy of the statute was to preserve the wife's disabilities in connection with her common law lands and her equitable separate estate, and as to contracts of partnership with her husband, and therefore not to extend her contractual powers in any of these directions, it was not unnatural that the revisors should have provided that "every contract *which she has power to make*, shall be deemed to be made with reference to" her separate estate. Or, to paraphrase the provision, "every contract of a married woman, save those affecting her common law lands and her equitable separate estate and contracts of partnership with her husband, shall be binding upon her personally, but shall be deemed to have been made only with reference to her separate estate, and not with reference to her common law lands or her equitable separate estate."

That the revisors themselves did not intend to exact as a qualification for the exercise of contractual powers the present ownership of separate estate, appears from the language of section 2295: "Every contract . . . which she has the power to make shall be deemed to be made with reference to her estate which is made her separate estate by this chapter, as a source of credit, and every such contract shall be deemed as intended to be made with reference to her equitable separate estate also, IF ANY SHE HAS, as a source of credit to the extent of her power over the same," etc. In other words, she may contract with reference to the statutory estate whether she has it

or not, but she must possess present equitable separate estate. The condition "if any she has" is carefully omitted in authorizing contracts with reference to the statutory estate, and is attached only to contracts with reference to the equitable separate estate. Both provisions occur in the same section, and, indeed, in the same sentence, which excludes the possibility of the absence of the condition in the one case and its presence in the other, being due to anything but deliberate intention. *Expressio unius alterius est exclusio.*

If an unmarried woman, without estate, incurs a contractual liability, and then marries (since May 1, 1888), it is clear enough, as shown hereafter,<sup>1</sup> that she must be sued thereon as a *feme sole*. The judgment entered in such suit is a personal one, but her statutory estate alone can be subjected; since all judgments under this chapter are limited to the separate estate.<sup>2</sup> If she has no such estate, certainly the judgment will await the acquisition of such estate, and any such estate subsequently acquired would be liable to satisfy it. Here, then, we have a limited judgment against a married woman who has no separate estate—on a contract not made with reference to any such estate—nor on the faith and credit of such estate, according to the opposing view, since, according to this view, she cannot contract on the faith and credit of what she does not possess. And yet it is not conceivable that any question could be made as to the right of the creditor in such case to pursue his claim to judgment, and to subject any future estate the debtor wife might acquire. If it be objected that she contracted on her personal credit, the answer is: so does the woman after marriage. The right to contract on the credit of her *person* is as clearly given to the wife by the statute, as the right to contract on the faith of her *estate*.<sup>3</sup>

So that, until the question is settled otherwise by an authoritative decision of the Supreme Court of Appeals, we must adhere to the conclusion, announced in our former paper on this subject, that present ownership of separate estate is not an essential qualification for the exercise of general contractual powers by the wife—excepting, always, contracts affecting her common law lands and her equitable separate estate and contracts of partnership with her husband.<sup>4</sup>

<sup>1</sup> *Post*, XIII.

<sup>2</sup> *Post*, XVI.

<sup>3</sup> "A personal judgment or decree may be rendered . . . against her; and . . . the same may be enforced against *her* and any separate estate she has or may subsequently acquire . . . in the same manner as if she were unmarried." Code, sec. 2289.

<sup>4</sup> This argument is elaborated in the article in 3 Va. Law Reg. 635. The argument

### IX. Husband's liability for wife's contracts—

1. *Antenuptial contracts.* For these the husband is in nowise responsible.<sup>1</sup>

2. *Postnuptial contracts.* For these the husband is equally exempt from responsibility.<sup>2</sup> The statute does not attempt, however, to alter the common law doctrine<sup>3</sup> that the husband is responsible for the support and maintenance of the wife. Hence, he is still bound for her contracts for necessities, etc., on the score of duty ;<sup>4</sup> and, of course, she may bind him on the score of agency, where she might have done so at common law, under the ordinary rules of principal and agent.<sup>5</sup>

### X. Wife's liability for her own torts—

1. *Antenuptial.* The common law liability of the husband for the antenuptial torts of the wife is wholly abrogated by the statute, and the wife is alone responsible for her torts committed before marriage.<sup>6</sup>

2. *Postnuptial torts—*

(a) *Connected with her separate estate, business, etc.* The statute, in express terms, imposes upon the wife the sole responsibility for postnuptial torts committed in connection with her separate estate, trade, business, labor, or services,<sup>7</sup> and, in equally explicit terms, exonerates the husband.<sup>8</sup>

Hence, if she maintain a nuisance on her separate estate; or be guilty

for the opposing view is presented in Mr. Burks' note to *Dezendorf v. Humphreys*, 3 Va. Law Reg. 793, 797. See also the opinion of Judge Harrison, of the 12th Judicial Circuit, published in full elsewhere in this number of the REGISTER.

<sup>1</sup> "And upon contracts . . . . made . . . . before her marriage, she may . . . . be sued . . . . as if she were unmarried."—Code, sec. 2288. "Nor shall he or his estate be bound for any debt or liability contracted or incurred by her before their marriage."—Code, sec. 2290.

<sup>2</sup> "No contract made . . . . by a married woman in respect to her said separate estate, trade, business, labor, or services, . . . . or with reference to the said estate as a source of credit, shall render her husband or his estate responsible thereunder or therefor."—Code, sec. 2290. "And upon such contracts . . . . she may . . . . be sued . . . . as if she were unmarried."—Code, sec. 2288.

<sup>3</sup> 1 Minor's Institutes (4th ed.), 373-4.

<sup>4</sup> 2 Bish. Mar. Wom. 158; *Richmond etc. R. Co. v. Bowles*, 92 Va. 738, 744.

<sup>5</sup> 1 Minor's Institutes, 372.

<sup>6</sup> "Nor shall he or his estate be bound for any . . . . liability . . . . incurred by her before their marriage."—Code, sec. 2290. "And upon . . . . liabilities . . . . incurred before her marriage, she may . . . . be sued . . . . as if she were unmarried."—Code, sec. 2288.

<sup>7</sup> "And as to all matters connected with, relating to, or affecting such trade, business, labor, services, or separate estate, . . . . she may . . . . be sued . . . . as if she were unmarried."—Code, sec. 2288.

<sup>8</sup> "No . . . . liability incurred . . . . in respect to her said separate estate, trade, business, labor, or services, or in matters connected with, relating to, or affecting the same, . . . . shall render the husband or his estate responsible thereunder or therefor."—Code, sec. 2290.

of deceit in matters connected with her separate estate or business; or, as a common carrier or bailee, incur liabilities for injuries to passengers carried, or goods bailed; or, if engaged in running a dairy, the driver of her milk-cart should negligently run over a child in the street—in all such cases she is alone responsible.

(b) *Not connected with her separate estate, business, etc.* For these the husband remains liable as at common law, along with the wife, since, from motives of public policy, the statute nowhere undertakes to alter that liability. We are aware of no express decision to this effect in Virginia, but the obvious principle laid down in the case of *Richmond etc. R. Co. v. Bowles*,<sup>1</sup> that the common law rights and obligations of the husband remain unimpaired, except in so far as the statute has modified them, would necessarily lead to this conclusion. And such is the view generally adopted in other States.<sup>2</sup>

#### XI. Husband's liability for wife's torts—

(a) *Antenuptial.* As shown in the preceding section,<sup>3</sup> the husband's common law liability for the antenuptial torts of the wife is completely abrogated.

(b) *Postnuptial.* As shown in the preceding section,<sup>4</sup> the wife is alone responsible for torts in connection with her separate estate, trade, business, etc., while the husband's common law liability for other torts of the wife remains unimpaired.

#### XII. Suits by the wife—

1. *On her contracts, antenuptial or postnuptial.* As the benefit

<sup>1</sup> 92 Va. 738, 744.

<sup>2</sup> 2 Bish. Mar. Wom. 264-269; *Fitzgerald v. Quann*, 109 N. Y. 441 (17 N. E. 354); *Gill v. State*, 39 W. Va. 479 (45 Am. St. Rep. 928). The opinion of Riddick, J., in *Kies v. Young* (Ark.), 42 S. W. 669, contains a learned discussion of the effect upon the husband's liability, of modern legislation depriving him of his marital *rights* without expressly exonerating him from marital *liabilities*. The reasoning by which the court reaches the conclusion that the husband's liability remains as at common law, until clearly changed by statute, seems to be unanswerable. The opinion collects the authorities on the subject. A contrary rule prevails in some States, doubtless due to the peculiar language of their statutes. See *Haight v. McVey*, 69 Ill. 627; *Norris v. Corkill* (Kan.), 4 Pac. 862; *Lane v. Bryant* (Ky.), 37 S. W. 584 (36 L. R. A. 709). Bishop bases the husband's liability for the wife's torts, at common law, on the necessity of their being joint defendants. Hence he concludes that the question whether modern enabling statutes have removed the husband's liability, depends upon whether the statute authorizes an action against the wife, in such case, without joining the husband. If so, the wife alone is liable. If not, the husband's common law liability remains. The Virginia statute does not authorize a suit against the wife alone, in such case. The statute makes no provision for the postnuptial torts of the wife, save those connected with her separate estate, business, etc. See Code, secs. 2288, 2290.

<sup>3</sup> *Ante*, X, and note.

<sup>4</sup> *Ib.*

of her antenuptial contracts and of her postnuptial contracts made in accordance with this chapter, is secured to her,<sup>1</sup> she sues thereon as if unmarried—as freely in a court of law, where the claim is legal, as in a court of equity, where the claim is equitable. And where she is thus permitted to sue alone, she must so sue, and it is error to unite the husband.<sup>2</sup>

2. *For torts to her person or estate, antenuptial or postnuptial.* As the statute declares that “damages for a wrong” shall constitute a part of her separate estate, whether the wrong be committed before or after marriage,<sup>3</sup> suits for the recovery of such damages must be brought in her own name, and it is error to unite the husband.<sup>4</sup>

Doubtless an action for a permanent injury to the wife’s common law lands must still be brought in the name of the husband and wife, though a literal rendering of the phrase “damages for a wrong” would include a wrong of this nature.

### XIII. Suits against the wife—

1. *On her contracts.* As the husband is not liable for any of her contracts, whether made before or after marriage,<sup>5</sup> she is sued thereon as if unmarried, and it is error to unite the husband.<sup>6</sup>

As heretofore shown, she may still bind him on the score of duty for her support and maintenance, and, of course, on the score of agency, under the ordinary rules of agency.<sup>7</sup> When, therefore, living with her husband, she makes a postnuptial contract, it is always a question of fact whether she contracted on her own credit or on that of her husband. Where she purchases ordinary family supplies, or contracts for services to be rendered to herself or her household, the

<sup>1</sup> Code, secs. 2284, 2287. “And upon such contracts” [postnuptial—connected with her trade, business, etc., or her separate estate, or on the faith and credit thereof] . . . . “and upon contracts . . . made . . . before her marriage, she may sue . . . in the same manner, and there shall be the same remedies in respect thereof, for . . . her and her said estate, as if she were unmarried.” Code, sec. 2288.

<sup>2</sup> *Richmond, &c. R. Co. v. Bowles*, 92 Va. 738; *N. & W. R. Co. v. Dougherty*, 92 Va. 372. In the former case it was held that while improper to sue by next friend, the error was not fatal, and the declaration might be amended by striking out the name of the next friend.

<sup>3</sup> Code, sec. 2284.

<sup>4</sup> *Ante*, XII, 1, and notes.

<sup>5</sup> *Ante*, IX.

<sup>6</sup> “And upon contracts . . . made . . . before her marriage, she may . . . be sued . . . as if she were unmarried.” Code, sec. 2288. “And upon such contracts” [post-nuptial—made in accordance with this chapter] “she may . . . be sued . . . as if she were unmarried.” *Ib.*; *N. & W. R. Co. v. Dougherty*, 92 Va. 372.

<sup>7</sup> *Ante*, IX, 2.

presumption is that she contracted on the credit of her husband, unless the circumstances indicate a contrary intention.<sup>1</sup>

2. *For her torts*—

(a) *Antenuptial*. As she is solely responsible for these, she must be sued therefor as if unmarried.<sup>2</sup>

(b) *Postnuptial*. If incurred in connection with her trade, business, labor, etc., or her separate estate, she is solely responsible, and the suit must be against her alone.<sup>3</sup>

For all other torts the husband's liability remains unaltered, so that both are liable, and both must be sued together.<sup>4</sup>

XIV. *Suits between husband and wife*—

1. *Wife against husband*. The statute in express terms provides that she shall not be entitled to an action against him for "any injury to her *person* or *reputation* committed by him before their marriage or during the coverture."<sup>5</sup>

The clear inference from this language, as well as from the general policy of the statute, is that in all other cases of tort or contract, antenuptial or postnuptial, she may sue him as freely "as if unmarried."<sup>6</sup>

It must be borne in mind, however, that she can enter into contract of partnership with her husband.<sup>7</sup>

2. *Husband against wife*—

(A) *In contract*. It is equally clear that the husband may sue the wife on any valid contract between them, as freely "as if unmarried," whether the contract be made before or after marriage.<sup>8</sup>

(B) *In tort*—

(1) *To his person or reputation*—

(a) *After coverture*. For a postnuptial tort to his person or reputation, not in connection with her separate business or estate, he could maintain no action against her, since as we have seen,<sup>9</sup> he is responsible along with her for such torts, and the two must be sued jointly. He could not be plaintiff and defendant in the same suit.

<sup>1</sup> *Harshberger v. Alger*, 31 Gratt. 52; *Geiger v. Blackley*, 86 Va. 328; *Burks' Prop. R. Mar. Wom.* 28-29.

<sup>2</sup> *Ante*, X.

<sup>3</sup> *Ib.*

<sup>4</sup> See *ante*, X, 2, (b).

<sup>5</sup> Code, sec. 2284.

<sup>6</sup> Code, sec. 2288.

<sup>7</sup> Code, sec. 2287; *ante*, VIII, 2, (d).

<sup>8</sup> Code, sec. 2288.

<sup>9</sup> *Ante*, X, 2, (b).

But if the tort by the wife be connected with her trade, business, etc., or her separate estate, the language of the statute clearly gives him a right of action; for in such cases she is to be sued alone, and there are "the same remedies in respect thereof . . . against her and her said estate, as if she were unmarried."<sup>1</sup>

Hence, if the driver of her delivery wagon, used in her separate business, negligently runs over him, or a newspaper owned or conducted by her libels him, each of these being a tort connected with her separate business, for which she is solely responsible, and in respect of which there are the "same remedies against her as if she were unmarried," the husband may maintain an action against her for the resulting damages.

Inasmuch, however, as the wife could maintain no action against *him* under similar circumstances, it is probable that the courts would strain a point and decline to entertain jurisdiction of such actions. But the right of action seems plainly authorized.

(b) *Before coverture*. If the tort to his person or reputation be committed before coverture, no difficulty is presented as to the remedy. The wife is sued as if sole, as in the case of a postnuptial tort in connection with her separate estate.<sup>2</sup> The same reasoning presented above as to torts in connection with the separate estate, business, etc., is applicable here. The statute gives the right, but the anomaly of the husband suing his wife for an antenuptial battery or libel, when she could maintain no action against him under similar circumstances, may (and probably should) induce the courts to defeat the action by a forced construction.

(2) *Injury to husband's estate*—

(a) *Before coverture*. It is clear that for antenuptial wrongs to his estate committed by the wife, his remedy is not impaired by the marriage, since, for all her antenuptial liabilities, she may be sued as if unmarried.<sup>3</sup>

<sup>1</sup> "As to all matters connected with, relating to or affecting such trade, business labor, services, or separate estate . . . she may . . . be sued in the same manner, and there shall be the same remedies in respect thereof . . . against her and her said estate, as if she were unmarried."—Code, sec. 2288. "No . . . liability, incurred by a married woman in respect to her said separate estate, trade, business, labor or services, or in matters connected with, relating to or affecting the same . . . shall render her husband or his estate responsible . . . therefor."—Code, sec. 2290.

<sup>2</sup> "And upon contracts and liabilities made or incurred before her marriage, she may . . . be sued in the same manner, and there shall be the same remedies in respect thereof . . . against her and her said estate as if she were unmarried."—Code, sec. 2288.

<sup>3</sup> *Id.*



(b) *During coverture.* For all wrongs committed during coverture to the husband's estate, in connection with the wife's trade, business, etc., or her separate estate, she is responsible, and there are the same remedies for him against her as if he were a stranger, and she an unmarried woman.<sup>1</sup>

Hence, if her mill-pond, owned as separate estate, overflow her husband's premises, or her cattle destroy his crops, or her bull gore his ox, he may maintain his action against her as if she were unmarried. But for torts committed by the wife, during coverture, and not in connection with her trade, business, etc., nor her separate estate, husband and wife must be sued jointly, as we have seen.<sup>2</sup> Hence, where such tort is to his property, he is without legal remedy, as at common law.

#### XV. The pleadings, in suits by and against the wife—

##### 1. *Where wife is defendant—*

(a) *In contract.* If the views above presented as to the wife's general contractual powers shall prevail—that is, that every wife who makes a contract, whether she is engaged in business or owns separate estate or not, is held, as a matter of law, to have been contracted on the faith and credit of her separate estate, owned or to be acquired (with the exceptions mentioned<sup>3</sup>), then the declaration against her, in a contractual action, would be precisely the same as if she were unmarried, save that in an action on a covenant of warranty in such a deed as is referred to in section 2502 (conveying her contingent right of dower, etc.), the declaration should contain an allegation that she contracted with express reference to her separate estate (owned or to be owned) as a source of credit.<sup>4</sup>

Inasmuch, however, as the Supreme Court of Appeals has ruled,<sup>5</sup> in dealing with a contract under the Smith Act, that although she is presumed, as a matter of law, to contract on the faith of her estate (held under that act) and cannot deny it, yet the plaintiff must allege that the contract was made on the faith and credit of such estate, no careful pleader would omit that allegation. But it seems clear that he need not prove it; and as the statute provides that alle-

<sup>1</sup> Code, sec. 2288; *ante* (B) (1).

<sup>2</sup> *Ante*, X (2) (b).

<sup>3</sup> *Ante* VIII.

<sup>4</sup> "If the contract be a covenant or warranty in such a writing as is mentioned in section 2502, it shall be subject to the provisions of said section."—Code, sec. 2295. See *ante*, VIII, 2 (c).

<sup>5</sup> *Duval v. Chelf*, 92 Va. 489, 493. See Judge Burks' comments, 1 Va. Law Reg. 898-9.

gations which are not traversable need not be alleged,<sup>1</sup> it is not unlikely that the court will recede from this position when the question is squarely presented.

If, on the other hand, the view should prevail that the wife must either possess separate estate, or else be engaged in trade, business, etc., in order to be qualified to contract, then the declaration should contain a proper averment that she was possessed of separate estate, or that the contract was made in connection with her trade, business, labor or services.

In view of the strong dissent<sup>2</sup> from the views expressed in this paper as to the general contractual powers of the wife, already referred to,<sup>3</sup> he would be a reckless pleader who omits any of the allegations mentioned, if possible of proof.

Of course, if the coverture of the defendant do not appear from the declaration, and she desires to raise the question of coverture, she must do so by proper plea. The plaintiff may then, in his replication, allege the facts upon which he relies to establish her liability, notwithstanding her coverture.<sup>4</sup>

(b) *In tort.* If it appear from the face of the declaration that the defendant is a married woman, there must of course be proper allegations to show a cause of action against her, under the principles heretofore stated in connection with the discussion of her liability for torts.

Thus, if she were sued for libel, without the joinder of her husband, it should appear that the libel was uttered in connection with her business, trade, etc., or her separate estate, or else that it was published before her marriage.<sup>5</sup>

2. *Where the wife is plaintiff.* The same principles apply where she is plaintiff. If she appear, from the face of the declaration, to be a married woman, she must allege facts sufficient to justify her in suing alone, without the joinder of her husband, and to sustain the cause of action. Otherwise the declaration would be demurrable.

If, for example, the action were for a tort to her *person*, no particular allegation would be essential to justify the sole suit, since the damages recovered constitute her separate estate.<sup>6</sup> If, on the other hand,

<sup>1</sup> Code, sec. 3245.

<sup>2</sup> See 3 Va. Law. Reg. 637-8; *Id.* 797; Circuit Court opinion published elsewhere in the present number of this journal.

<sup>3</sup> *Ante*, VIII, 2 (e).

<sup>4</sup> See Judge Burks' note to *Duval v. Chelf*, 1 Va. Law Reg. 898. Several forms of declarations against married women, prepared by the late Judge Burks, will be found in 3 Va. Law Reg. 614.

<sup>5</sup> See *ante*, X.

<sup>6</sup> Code, sec. 2284; *ante*, XII.

the action were for a tort to her *estate*, and her coverture appear from the face of the allegation, declaration, there must be an allegation that the property is her separate estate.

If the action were in contract, the same principles apply as where she is defendant.<sup>1</sup>

**XVI. Character and extent of the judgment against the wife.** At common law, a judgment against the wife (along with the husband) was unlimited—binding her common law lands and her equitable separate estate to the extent of her powers over it. In a proceeding to subject her equitable separate estate to her engagements, the decree is *in rem* only, and affects only such equitable separate estate as she possessed at the time of the engagement. The judgment against the wife under this chapter, while partaking somewhat of the nature of both of these, differs essentially from either. It is in form personal, as at common law; but it is expressly limited in its operation to her person and the statutory separate estate then owned or subsequently acquired.<sup>2</sup>

The judgment under this chapter would not, therefore, be enforceable out of her common law lands or her equitable separate estate. The statute, in terms, confines its operation to the statutory estate. Whether such judgment would be enforceable against property held under the Smith Act, is discussed below.<sup>3</sup>

Hence, while at common law if a woman made a contract or committed a tort, and afterwards married, judgment thereon would have been against husband and wife, enforceable against the estate of either,<sup>4</sup> and out of the equitable separate estate of the wife to the extent of her powers over it,<sup>5</sup> yet under this chapter, she would be sued alone, and the judgment would be limited to her statutory estate. This works out the curious result, that an unmarried woman upon whom has been settled a large equitable separate estate, with unlimited powers respecting it, may incur heavy liabilities, in contract or tort, and by taking a husband before action brought (or, doubtless, at any time before judgment) may escape all liability, so far as the equitable separate estate is concerned. The judgment would be a limited, statutory

<sup>1</sup> *Ante*, XV, 1 (a).

<sup>2</sup> Code, sec. 2289.

<sup>3</sup> *Post*, XVIII.

<sup>4</sup> *Burks' Prop. R. Mar. Wom.* 54; *Gill v. State*, 39 W. Va. 479 (45 Am. St. Rep. 928; 20 S. E. 568); *Merrill v. St. Louis*, 83 Mo. 244 (58 Am. Rep. 576); note to *Brazil v. Moran*, 88 Am. Dec. 776; 2 *Bishop, Mar. Wom.* 319.

<sup>5</sup> *Burks' Prop. R. Mar. Wom.* 54.

judgment, binding on nothing, under the express terms of the statute,<sup>1</sup> save her statutory separate estate; and the creditor would seem to be effectually excluded from any recourse against the equitable separate estate. His remedy at common law was plain enough: He recovered an unlimited, personal judgment against husband and wife, and the equitable separate estate (to the extent of her powers over it) was liable for its satisfaction, along with any other property possessed by either consort.

On account of the apparent hardship of the case, the courts will probably reach a conclusion different from that here announced. But there is no logical escape from the conclusion.

The difficulty here is not so much in the right as in the remedy. The equitable separate was reached, in such case, through the medium of an unlimited, common law judgment. This remedy the statute takes away, substituting for it a limited judgment, which cannot, by the very terms of the statute giving it, reach the equitable separate estate. As courts of equity administer the equitable separate estate for purposes of justice, moulding the rules by which it is governed, to that end, and as it is the boast of these courts to suffer no right to be without a remedy, it is not improbable that when such a case shall arise, the courts of equity will permit the equitable separate to be subjected for the satisfaction of the liability.

The question whether a judgment against the wife on an antenuptial liability (in contract or tort) could be enforced against common law lands will scarcely arise in practice, since no woman married since May 1, 1888, can possess common law lands; and no woman married prior to that time is likely to be sued at this day on a liability incurred before her marriage.

#### XVII. Effect of this chapter on the wife's equitable separate estate—

1. *As to creation of the estate.* The statute provides, in substance, that equitable separate estates shall not in any manner be affected by this chapter or be deemed to be within its operation.<sup>2</sup>

Hence, whatever limitation would have created an equitable separate estate under the settled principles of equity, existing before the

<sup>1</sup> "And when against her, the same may be enforced against her and any separate estate she has or may subsequently acquire (*but only against such estate*), in the same manner as if she were unmarried." Code, sec. 2289.

<sup>2</sup> Code, sec. 2294.

adoption of this chapter, will still have that effect, and the wife has the same privileges and disabilities with respect thereto as heretofore.<sup>1</sup>

Whether the rule prevailing in the equity courts, that an equitable separate estate results *where the husband is the grantor*, directly or indirectly, even in the absence of language otherwise essential to create such an estate, is abrogated by the language of section 2284, and by the cessation of the reason upon which the principle was founded, is a question. Conveyances from husband to wife are every-day transactions in the busy lawyer's office, and the question whether such conveyances, without special language, create statutory estates or equitable separate estate, is one of grave concern, since the legal consequences are widely different. It is worth while, therefore, to look into this a little more carefully: Prior to this legislation, a conveyance from husband to wife, directly or indirectly, created an equitable separate estate in the wife, because otherwise the conveyance would be inoperative.<sup>2</sup> But as the husband's conveyance to the wife may now, under the very broad provisions of this chapter, and especially of section 2284,<sup>3</sup> vest legal title in her, with complete divestiture of interest on his part, the reason for construing such a conveyance to be an equitable separate estate (in order to make it operative and shield it from the husband's marital rights) no longer exists.

And yet it is doubtful whether this broad language is not to be construed as qualified by the language of section 2294 preserving the equitable separate estate. The several sections are to be construed together. Section 2284 in effect provides that *every conveyance* to a married woman since May 1, 1888, shall vest legal title in her, and constitute her *statutory* estate; section 2294, in effect, provides that *every conveyance* which would have been an equitable separate estate under the existing rules governing such estates shall still so operate.<sup>4</sup>

It would seem that the latter section is a qualification of the former, and therefore requires that a conveyance from husband to wife shall

<sup>1</sup> *Dezendorf v. Humphreys*, 95 Va. 473.

<sup>2</sup> *Leake v. Benson*, 29 Gratt. 153, 156; *Irvine v. Greever*, 32 Gratt. 411; *Burks' Prop. R. Mar. Wom.* 13, 14.

<sup>3</sup> "All real and personal estate . . . which any married woman may hereafter acquire or become entitled to during coverture, by gift, grant, purchase, descent, devise, bequest, or in any other manner whatever . . . shall be and continue her separate estate." Code, sec. 2284.

<sup>4</sup> "Nothing in the preceding sections of this chapter shall be construed to prevent the creation of equitable separate estates. Such estates shall not be deemed to be within the operation of the said sections, but they shall be held according to the provisions of the respective settlements thereof, and shall be subject to and governed by the rules and principles of equity applicable to such estates." Code, sec. 2294.

still be construed as an equitable separate, rather than that the former section shall be regarded as a qualification of the latter, making a settlement upon the wife by the husband her statutory estate. The contrary construction would, in a material manner, alter the settled rules of equity with respect to the equitable separate estate, contrary to the provision of section 2294 that the equitable separate estate "shall not be deemed to be within the operation of the said sections, but they shall . . . be subject to and governed by the rules and principles of equity applicable to such estates." Applying, then, the rule of equity applicable to such estates, the conveyance from the husband to the wife is an equitable separate estate; and being an equitable separate estate, it is to be "deemed not to be within the operation of the said sections," howsoever broad their language.

2. *Liability of the equitable separate estate for wife's engagements.* It is provided that every contract which the wife has power to make shall be deemed to be made, not only with reference to her statutory estate as a source of credit, but with reference also to her equitable separate estate, to the extent of her powers over it, unless the contrary be expressed in the contract.<sup>1</sup> This was probably declaratory of the existing law on the subject.

The same section, as amended,<sup>2</sup> provides that in the enforcement of every such contract against the equitable separate estate, the court may subject the *corpus* of the real estate, to the extent of the wife's interest in and power over the same, but the personal estate is to be first subjected. This was practically the ruling of the court before the adoption of the amendment.<sup>3</sup>

#### XVIII. Effect of this chapter on property of the wife, held under the Smith Act—

By the provisions of section 2297 all rights established, powers conferred or limitations imposed by the Smith Act, shall remain unimpaired, except that the husband need not join in any contract hereafter made by his wife concerning her *personal* estate held under that act, or be joined in any suit by or against her, on any contract or liability incurred with reference thereto, unless his interest requires it.<sup>4</sup>

<sup>1</sup> Code, sec. 2295.

<sup>2</sup> Acts 1895-6, p. 486.

<sup>3</sup> *Price v. Planters Bank*, 92 Va. 468; *Miller v. Miller*, 92 Va. 510.

<sup>4</sup> "All rights established" [by virtue of the Smith Act and the act of 1875] . . . .  
"and all powers conferred, immunities granted, and restrictions and limitations imposed by the same, shall remain unimpaired . . . . except that it shall not be necessary that the husband shall join in any contract hereafter made by his

That is to say:

1. *Wife's contracts concerning her personal property, under the Smith Act.* By the terms of the original Smith Act, the joinder of the husband in all contracts made with reference to her real or personal property under the act, is required—save as to contracts made by her as a sole trader.<sup>1</sup>

The necessity for the husband's uniting in the wife's contracts "*concerning*" her personal estate, under the Smith Act, is removed by section 2297. The precise significance of the expression "*concerning*" is important. Here it doubtless bears its natural import, "*in direct relation to,*" "*in connection with,*" and not the broader signification of "*with reference to*" or "*on the faith and credit thereof.*"<sup>2</sup> When she makes a contract, valid under this act, she is held as a matter of law, to contract "*with reference to*" (*i. e.*, "*upon the credit of*") her estate held under the act, both real and personal.<sup>3</sup> So, it would be difficult to conceive of the wife making a contract under the act "*with reference to*" her *personal* estate alone and not her *real* estate, where she has both. The revisors fully understood the legal significance of these several expressions, and were careful, throughout the chapter, in distinguishing between contracts in direct relation to ("*concerning*" or "*affecting*") and those made "*with reference to*" and "*on the credit of*" the separate estate. Hence, we conclude that the contracts of the wife, in which the husband need not unite, are only those in *direct connection with the personal separate estate.*

2. *All other contracts of the wife.* It would seem that the form and validity of all other contracts of the wife, so far as they affect property under this act, depend upon the Smith Act in its original form, and that this chapter has wrought no change in that respect. For the

wife concerning the personal estate which shall have become her separate estate under the said acts or either of them, or be joined unless interest requires it, in any suit by or against her upon any contract made or liability incurred with reference to her estate . . . . . under the said acts." Code, sec. 2297.

<sup>1</sup> "And any such married woman shall have power to contract in relation thereto, or for the disposal thereof . . . . . as if she were a *feme sole*; provided that her husband shall join in any contract in reference to her real or personal property, other than such as she may acquire as a sole trader"—Acts 1876-7, p. 333. This requirement that the husband shall unite with her in her contracts seems, as shown by Mr. Burks, to have been in some instances disregarded by the courts, apparently through inadvertence. Burks' Prop. R. Mar. Wom. 71 *et seq.*

<sup>2</sup> Burks' Prop. R. Mar. Wom. 62, *et seq.*

<sup>3</sup> Duval v. Chelf, 92 Va. 489.

essentials and effect of such contracts, reference is made to Mr. Burks' excellent discussion in his monograph on the subject.<sup>1</sup>

If our construction of section 2297, as given above, is the proper one, then the wife cannot affect her *real* property held under the Smith Act, save by uniting with her husband in the contract; nor her *personal* estate, by her sole contract, unless it be in direct connection therewith (as *e. g.* for the sale or hire or improvement thereof). Hence such property could not be subjected by her creditor on the ground that she contracted "with reference thereto" or "on the faith and credit thereof," unless the husband has united in the contract. And, hence, it must follow that a judgment entered against her, under section 2289, on a sole contract made by her, and not "concerning" her personal estate held under the Smith Act, would not bind such property, because the contract, while valid as to property held under the Code, is invalid as to the other. Any construction which would give the wife the same freedom in binding property under the Smith Act, as under the Code, would render the provisions of section 2297, preserving the restrictions and limitations of the Smith Act, inoperative.

Mr. Burks assumes that such a judgment *would* bind property held under the Smith law.<sup>2</sup> But it is submitted with deference that the provision of section 2289, that a judgment against the wife on a sole contract "may be enforced against her and any separate estate she has or may subsequently acquire (but only against such estate) in the same manner as if she were unmarried," refers only to property *held under the Code*. The revisors seem to have used the expression "separate estate" throughout this chapter, when unaccompanied by other qualifying words, as applicable only to property held under the Code.

3. *Suits by and against the wife, as to matters arising under the Smith Act.* Section 2297 provides that the husband need not "be joined, unless interest requires it, in any suit by or against her upon any contract made or liability incurred with reference to her estate" under the Smith Act.

The precise import of this is not clear. As the husband must unite in all contracts in reference to such estate (save those mentioned above,<sup>3</sup> made in *connection* with her *personal* estate), it would seem that he is a necessary party to any suit to enforce such contracts, whether the

<sup>1</sup> Burks' Prop. R. Mar. Wom. 59 *et seq.*

<sup>2</sup> *Ib.* 82.

<sup>3</sup> *Supra*, XVIII, 1.



wife be plaintiff or defendant. It may be that where the husband thus unites in the contract for conformity only, the purpose of the statute is to allow the wife to sue or be sued in such case without uniting him. No other explanation presents itself to our minds, and though this construction is doubtful and unsatisfactory, it must serve the present purpose, in the absence of judicial construction.

In the case of *Duval v. Chelf*,<sup>1</sup> involving a contract made by a married woman under the Smith Act, the contract was jointly made by husband and wife, and suit was instituted against both. The wife seems to have been surety for the husband, so that the question whether if it had been her contract, and he had united for conformity only, did not arise.

It was held in the same case that, while the judgment against the wife on such a contract is in form a personal one, it is confined in its operation to such property held under the Smith Act as she possessed at the time of entering into the contract, or so much thereof as remains at the time the lien of the judgment or execution attaches.

Section 2298, after preserving certain special remedies secured to the wife under this act, the original Smith act, provides that, "in other respects the remedies for and against a married woman and her estate" [held under the act] "shall be the same as those for and against a married woman and her estate which is made her separate estate by this chapter."

That is, presumably, that for the recovery of such estate, or for injuries thereto, she sues in her own name, without the joinder of her husband; and that for her torts in connection with such estate she is sued alone, as if the estate were held under the provisions of this chapter.

**XIX. Appointment of receivers for married women who are minors.** Sections 2291 and 2292 provide for the appointment of receivers to take charge of the estates of women who marry while under age.

These provisions seem to call for no special comment, and it is sufficient to refer to Mr. Burks' discussion thereof.<sup>2</sup> It may be noted that when the estate is thus taken charge of by the receiver, the court may authorize him to apply the principal of the estate, or any part thereof, to the wife's separate use. And no proof seems to be required, as in case the estate is in the hands of a guardian, that such use is essential

<sup>1</sup> 92 Va. 489.

<sup>2</sup> Burks' Prop. R. Mar. Wom. 83, *et seq.*

to the support, maintenance or education of the infant.<sup>1</sup> The policy of greater liberality in the expenditure of the infant's estate, after marriage, was doubtless one of the motives of the revisors in substituting a receiver in the place of the guardian.

W. M. LILE.

*University of Virginia.*

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## APPENDIX TO THE FOREGOING ANALYSIS.

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### CHAPTER 103 OF THE VIRGINIA CODE.

(Omitting sections 2291, 2292 and 2236.)

**Sec. 2284. The separate estate of a married woman; what it includes.**—All real and personal estate to which any woman hereafter marrying is entitled at the time of her marriage, or which any married woman may hereafter acquire or become entitled to during coverture, by gift, grant, purchase, descent, devise, bequest, or in any other manner whatever, and the rents, issues, income, profits, and all increase thereof, shall be and continue her separate estate. The separate estate shall include rights in action, damages for a wrong, and compensation for property taken for public use, to which a woman is entitled at her marriage, or to which she becomes entitled during coverture. Nothing however in this or any other section of this chapter shall be construed as giving to a married woman a right to damages or a right of action therefor against her husband for any injury to her person or reputation committed by him before their marriage or during the coverture.

**Sec. 2285. Not subject to control of husband or liable for his debts.**—Such separate estate of a married woman shall not be subject to the use, control, or disposal of her husband, or to his debts or liabilities, whether contracted or incurred before or after marriage.

**Sec. 2286. Power of married woman over her separate estate; curtesy of husband.**—A married woman shall have the right and power to hold, control, and use her said separate estate as if she were sole, and, by her sole act, encumber, convey, devise, bequeath, or otherwise dispose of her said separate estate, in the same manner and with the like effect as if she were unmarried: *Provided however*, that her husband shall be entitled to curtesy, when the common law requisites therefor exist, in her separate real estate, and he shall not be deprived thereof by her sole act. But the right to curtesy shall not entitle him to the possession or use, or to the rents, issues, and profits of the said estate, during the coverture.

**Sec. 2287. She may engage in trade, &c., for her own use; products and earnings to be her separate estate.**—A married woman may engage in trade and carry on business (but not as a partner with her husband) for her separate use and benefit, in the same manner as if she were unmarried; and all work and labor performed by her for a person other than her husband or her children, shall, unless there be an express agreement to the contrary, be presumed to be on her sep-

<sup>1</sup> Code, secs. 2604, 2609.

arate account. The products and earnings of such trade, business, work, and labor shall be her separate estate, and the two preceding sections shall apply thereto.

**Sec. 2288. Her right to make contracts; suits by and against her.**—She may make contracts, as if sole, in respect to such trade, business, labor, services, and her said separate estate, or upon the faith and credit thereof; and upon such contracts, and as to all matters connected with, relating to, or affecting such trade, business, labor, services, or separate estate, and upon contracts and liabilities made or incurred before her marriage, she may sue and be sued in the same manner, and there shall be the same remedies in respect thereof, for and against her and her said estate, as if she were unmarried.

**Sec. 2289. Nature of the judgment or decree rendered for or against her; how enforced.**—In any case in which a married woman may sue or be sued under the provisions of the preceding section, a personal judgment or decree may be rendered for or against her; and when against her, the same may be enforced against her, and any separate estate she has or may subsequently acquire (but only against such estate), in the same manner as if she were unmarried.

**Sec. 2290. Husband not liable for her debts.**—No contract made or liability incurred by a married woman in respect to her said separate estate, trade, business, labor, or services, or in matters connected with, relating to, or affecting the same, or with reference to the said estate as a source of credit, shall render her husband or his estate responsible thereunder or therefor, nor shall he or his estate be bound for any debt or liability contracted or incurred by her before their marriage, where such marriage shall have taken place after the thirty-first day of March, eighteen hundred and seventy-five.

**Secs. 2291 and 2292.** (Providing for the appointment of receivers for married women who are minors).

**Sec. 2293. How separate estate of a married woman to pass at death.**—When a married woman having title to any estate which is made her separate estate by this chapter, or has become her separate estate under the acts of the General Assembly mentioned in the preceding section, or under either of the said acts, dies intestate as to the said estate or any part thereof, it or such part shall pass according to the provisions of chapter one hundred and thirteen, subject to her debts, and to the curtesy of her husband (if he survive her).

**Sec. 2294. Separate equitable estates; how affected.**—Nothing contained in the preceding sections of this chapter shall be construed to prevent the creation of equitable separate estates. Such estates shall not be deemed to be within the operation of the said sections, but they shall be held according to the provisions of the respective settlements thereof, and shall be subject to and governed by the rules and principles of equity applicable to such estates.

**Sec. 2295** (as amended by Acts 1895-6, p. 486). **Liability of separate estates of married women for their contracts.**—Every contract hereafter made by a married woman which she has the power to make shall be deemed to be made with reference to her estate, which is made her separate estate by this chapter as a source of credit, and every such contract shall be deemed as intended to be made with reference to her equitable separate estate also, if any she has, as a

source of credit to the extent of her power over the same, unless the contrary intention is expressed in the contract; and in the enforcement of every such contract against her equitable separate estate a court of equity may in any case subject, to the extent of her power over the same and of her interest therein, the corpus of any real estate as well as the corpus of any personal estate settled to her separate use, but the corpus of such real estate shall not be subjected by a sale of the same, or any part thereof, unless it is admitted or be made to appear that the rents and profits of such real estate will not be sufficient to discharge the liabilities of such estate within five years: Provided, that if the contract be a covenant or warranty in such a writing as is mentioned in section twenty-five hundred and two, it shall be subject to the provisions of the said section.

**Sec. 2296.** (Providing that husband's curtesy shall be barred by desertion).

**Sec. 2297.** Preservation of certain rights of husband and wife; unnecessary for him to join in her contracts, or to join or be joined in suits by or against her.—All rights established, accrued, or accruing, before this Code takes effect, in virtue of the acts of the General Assembly mentioned in section twenty-two hundred and ninety-two, or the act entitled “an act to exempt the property of the husband or wife from the antenuptial debts of the other,” approved March thirty-first, eighteen hundred and seventy-five, and all powers conferred, immunities granted, and restrictions and limitations imposed by the same, shall remain unimpaired, as respects the estate of a married woman, which shall have become her separate estate, under the said acts or either of them, before this Code takes effect: except that it shall not be necessary that the husband shall join in any contract hereafter made by his wife concerning the personal estate which shall have become her separate estate under the said acts or either of them, or be joined, unless interest requires it, in any suit by or against her upon any contract made or liability incurred with reference to her estate, which shall have become her separate estate under the said acts.

**Sec. 2298.** Remedies for or against married women as to their separate estates heretofore acquired.—The remedy provided for a married woman by the third section of the act entitled “an act securing to married women, on conditions, all property acquired by them before or after marriage,” approved April fourth, eighteen hundred and seventy-seven, is reserved to her, as to any estate which shall have become her separate estate under the said act or either of the other acts before mentioned in this chapter. In other respects, the remedies for and against a married woman and her estate, which shall have become her separate estate under the said acts, shall be the same as those for and against a married woman and her estate, which is made her separate estate by this chapter.